CURRENT DECISIONS

ALIENS—NATIONALITY—EXPATRIATION.—The petitioner, a French citizen, born in 1878, had completed his active military service in France. By law he automatically passed into the reserve army in 1902 and into the territorial army in 1912. In 1903 he removed to Switzerland and became naturalized there in 1909, without having obtained the consent of the French Government. The French law provides that such consent is necessary for expatriation up to the time a Frenchman passes into the territorial army. The petitioner was called into the French army in 1915, and claimed to be no longer a French citizen on the ground that at least after 1912, when by law he passed into the territorial army, governmental consent to expatriation became unnecessary. *Held,* that his expatriation was void *ab initio* and that the defect was not cured by the fact that after 1912 he could have expatriated himself by naturalization abroad without the French Government's consent. *In re Coutarel* (Tribunal Civil des Sables d'Olonne, May 30, 1916), reported in (1917) 44 CLUNET, 188.

BANKRUPTCY—PREFERENCES—RECORDING WITHIN FOUR MONTHS' PERIOD.—As security for a contemporaneous loan the debtor executed a mortgage upon his stock of merchandise at Macon, Georgia, on February 16, 1914. The mortgage was not recorded until August 20, 1914, at a time when the mortgagee knew of the debtor's insolvency. The following day an involuntary petition in bankruptcy was filed against the debtor. Recording was not fraudulently delayed and prior thereto no other liens were fixed upon the property. The local statute (Ga. Code 1910, sec. 3260) imposed the requirements of recording only in favor of a creditor who fixes a lien upon the property before the recording takes place. The trustee in bankruptcy sought to avoid the mortgage as a preferential transfer by virtue of sections 60b and 47a of the Bankruptcy Act, as amended. *Held,* that the mortgage was valid, since no one concerned in the distribution of the estate held rights superior to the mortgage prior to its record. *Martin v. Commercial Nat. Bank* (1918) 38 Sup. Ct. 176.

While previous decisions of the Supreme Court had foreshadowed this decision, it is satisfactory to have the precise point determined by the court of final authority.

CONFLICT OF LAWS—JURISDICTION FOR DIVORCE.—A German subject had married a French woman in France in 1911, where the matrimonial domicile was located. On the outbreak of war, he deserted her to join the armies of Germany. The woman brought an action for divorce in France. According to the law of Germany and of France, she became a German subject by marriage. The court appeared uncertain whether the case should be governed by the Hague Convention of June 12, 1902 (in force in Germany but abrogated in France), and whether under that Convention jurisdiction in divorce was concurrent between the courts of the country of nationality and those of the domicile or was vested solely in the national courts, provided the law of the nationality excluded the jurisdiction of the courts of the matrimonial domicile. *Held,* that the French courts of the place where the marriage was celebrated and of the matrimonial domicile would assume jurisdiction (without examining whether the German law excludes the jurisdiction of the courts of the matrimonial domicile, or whether there were courts in Germany competent

to entertain an action for divorce when the wife was domiciled and resident abroad), since otherwise under existing war conditions the woman would find herself without access to competent judges and would suffer a denial of justice. *Hamacher v. Duval* (Civil Tribunal of Boulogne, March 19, 1915), reported in (1917) 44 CLUNET, 179.

CONSTITUTIONAL LAW—DUE PROCESS OF LAW—ERROR OF TRIAL COURT.—In an action of ejectment brought in a federal district court, the trial judge received in evidence, as tending to establish title in the plaintiff, the records of certain previous suits resulting in judicial sales of tracts of land belonging to the predecessors in title of the present defendant. The plaintiff claimed title through these proceedings. Upon appeal to the Supreme Court of the United States, the defendant contended that the premises in question were not involved in the previous suits, and also that the defendant was not bound by the decrees in those suits, and that the admission of such incompetent evidence and the rendering of judgment for the plaintiff on the strength of it were such error as to amount to a violation of the defendant's rights under the "due process clause" of the Fifth Amendment. *Held,* that, whether or not the evidence was incompetent, "error of a trial judge in admitting evidence or entering judgment after a full hearing does not constitute a denial of due process of law." *Jones v. Buffalo Creek Coal & Coke Co.* (1917, U. S.) 38 Sup. Ct. 121.

It is to be noted that the trial court here was a federal court. For a discussion of denial of due process under the Fourteenth Amendment by errors of a state court, see (1917) 27 YALE LAW JOURNAL, 121. The fact that this case comes up under the Fifth Amendment should not, without more, differentiate it, since, in respect to what constitutes due process, the two amendments should be interpreted identically. Taylor, *Due Process of Law,* sec. 123; *Twining v. New Jersey* (1908) 211 U. S. 78, 101; 29 Sup. Ct. 14, 20.

CONTRACTS—EFFECT OF "WAR CLAUSE" PROVIDING FOR SUSPENSION IN TIME OF WAR.—In a contract for the sale and delivery of merchandise, concluded prior to the outbreak of war, there was a clause providing that the vendor had the privilege of suspending delivery if war should break out, and, after a certain period, of terminating the entire contract. In an action for failure to make deliveries, the defendant, relying on this clause, alleged the fact that war had supervened. The plaintiff replied that the defendant's refusal to carry out the contract was prompted by business reasons. *Held,* that the clause was valid and that the defendant's motive in cancelling the contract was immaterial. *Milne & Co. v. Phosphates Tunisiens* (Court of Paris, 3d Chamber, July 27, 1916), reported in (1917) 44 CLUNET, 167.

A similar contract containing the "war clause" above mentioned was concluded *after* the outbreak of war. The vendor, relying upon the clause, broke the contract. *Held,* that the condition provided for in the "war clause" was inoperative, inasmuch as the war actually prevailed when the contract was made. *Doughty Sons and Richardson v. Phosphates Tunsiens* (Court of Paris, 3d Chamber, July 27, 1916), reported in (1917) 44 CLUNET, 171.

For a discussion of a recent American case involving a somewhat analogous contract see (1918) 27 YALE LAW JOURNAL, 408.

CORPORATIONS—PROHIBITION AGAINST PRACTICING LAW—FURNISHING ATTORNEY TO DRAFT WILL.—Section 280 of the New York Penal Law makes it unlawful for a corporation to practice law or "to furnish attorneys or counsel or to render legal services of any kind in actions or proceedings of any nature or in

any other way or manner." The defendant trust company advertised that it would give advice concerning the making of wills and the appointment of executors. When an application was made for such advice, a clerk of the defendant summoned by telephone an attorney retained by the defendant, who drafted a will for the customer, making the defendant executor. No charge was made to the customer for this service. *Held,* that the defendant was guilty of a violation of the statute. *People v. People's Trust Co.* (1917, App. Div.) 167 N. Y. Supp. 767.

The statute is prolix and blindly drawn and the meaning of the words above quoted is obscured rather than aided by reading them in their context. Some parts of the section would seem to indicate that it referred only to services or advice in connection with suits or proceedings before courts or other tribunals. Other provisions, however, tend to support the broader interpretation which the court gave to the section. As applied to the particular case the statute at first sight may appear somewhat drastic. It was obvious, however, that the inducement to the defendant to make such an arrangement was the hope or expectation of being named as executor in return for its courtesy to the customer, and the court justifies the prohibition on the ground that the situation thus created did not conduce to the undivided allegiance which a client should receive from his attorney.

EVIDENCE—ADMISSIONS—TRANSFER OF PROPERTY AS ADMISSION OF LIABILITY.—The plaintiff sued for personal injuries caused by the negligence of the driver of the defendant's jitney. The defendant claimed that the driver at the time was on "a frolic of his own," and was not acting within the scope of his employment in driving over the route where the accident happened. The plaintiff brought out by cross-examination of the defendant that he transferred his property to his wife immediately after the accident. *Held,* that the evidence was admissible as evidence of the defendant's consciousness that he was legally liable. *Chaufty v. DeVries* (1918, R. I.) 102 Atl. 612.

As indicated by the cases cited in the opinion, there is a conflict of authority on the admissibility of such evidence. It is true that a transfer of property might be made without any consciousness of liability, as for example, simply to avoid the inconvenience of having the property tied up during a threatened suit. But on the other hand, the defendant has an opportunity to explain his conduct, and while the court should no doubt proceed with caution, and each case should be considered on its own facts, it would seem that in many cases such evidence might have sufficient probative value to justify its admission under proper instructions. For a discussion of the admissibility of verbal admissions of liability see (1917) 27 YALE LAW JOURNAL, 277.

INTERNATIONAL LAW—TRADING WITH THE ENEMY.—Section 1 of the German legislative decree of Sept. 30, 1914, forbids payments to Great Britain or her colonies, directly or indirectly. The defendant, a partner (nationality not stated) of a firm in Punta Arenas, Chile, while resident in Germany, directed his firm in Chile by telegram to pay a debt owed by the firm to a British creditor. *Held,* that the defendant in Germany in effect directed the transfer of a part of his partnership funds located in Chile, to Great Britain, and hence was guilty of violating the decree mentioned. *In re Elkan,* reported in (1917) 44 CLUNET, 255, from an account of the case tried in the court of first instance (probably *Amtsgericht*) of Berlin, given in the *Frankfurter Zeitung* of June 19, 1916.

The prosecution contended that the decree prohibited any act which might increase the national resources of Great Britain, and that the prohibition

extended to all persons within the territorial jurisdiction of Germany, whether nationals or aliens, neutral or enemy; and that the legislative decree applied not only to the transfer of money from Germany, but from any foreign country as well. The defense contended that German legislation could not prohibit valid legal relations between two foreign countries or the fulfillment of obligations contracted by subjects of foreign states not to be performed in Germany. The court took the view that one element of the offense, the direction to pay, had taken place within the jurisdiction of Germany, and that this sufficed to bring the defendant within the penalty fixed by the decree.

LIMITATION OF ACTIONS—SET-OFF OF BARRED DEBT BY ADMINISTRATOR AGAINST DISTRIBUTEE.—The intestate at the time of her death had a claim against her son which was barred by the statute of limitations. One of the distributees brought suit to settle the estate, contending that the debt should be charged against the son's distributive share. *Held,* that the barred debt was not properly the subject of set-off against the son's share of the estate. *Luscher v. Security Trust Co.* (1918, Ky.) 199 S. W. 613.

By this decision Kentucky is added to the growing list of states which refuse to permit the share of a legatee or distributee to be reduced by a statute-barred debt—contrary to the English decisions and those of certain American courts. For a discussion of the subject see (1916) 26 YALE LAW JOURNAL, 236.

NEGLIGENCE—LIABILITY OF MANUFACTURER TO THIRD PARTIES—FAILURE TO WARN OF DETERIORATION OF PRODUCT.—The defendant manufactured a food product for infants and invalids which he knew or should have known was likely to deteriorate by time or manner of keeping after leaving his hands. The infant plaintiff's mother purchased a can of the food from a retailer to whom the defendant had sold it. The plaintiff was injured by eating the food, which had deteriorated. *Held,* that the defendant was chargeable with negligence in failing to affix to the package the date of manufacture and the time during which the ingredients might safely be used, or the manner in which they should be handled and preserved to prevent deterioration. *Rosenbusch v. Ambrosia Milk Corporation* (1917, N. Y. App. Div.) 168 N. Y. Supp. 505.

This is an interesting and novel, but it is believed a sound, extension of the principles upon which manufacturers are held liable in tort to remote vendees or consumers of the manufactured product. See (1917) 27 YALE LAW JOURNAL, 281.

NEGLIGENCE—PROXIMATE CAUSE—VOLUNTARY INTERVENTION OF PLAINTIFF'S INTESTATE.—The defendant's driver left its horse untied near a railroad platform. The horse wandered on to the platform and fell. The station master, the plaintiff's intestate, helped the horse to its feet and led him off the platform but did not tie him. The horse wandered back upon the platform and again fell. In attempting a second time to raise the horse the station master received injuries which proved fatal. A judgment dismissing the complaint was affirmed by the Appellate Division. *Held,* that the intervention of the deceased did not prevent the defendant's negligence from being the proximate cause of the accident and that the case should have been submitted to the jury. Chase and Cuddeback, JJ., *dissenting. Donnelly v. H. C. & A. I. Piercy Contracting Co.* (1918, N. Y.) 118 N. E. 605.

On the general subject of liability to volunteers, see (1918) 27 YALE LAW JOURNAL, 415.

PATENTS—RESTRAINT OF TRADE—PRICE RESTRICTIONS ON RESALE OF PATENTED ARTICLE.—The principal complainant was the owner of certain patents, under which it manufactured graphophones, records, etc.; the other complainant was its selling agent. The complainants undertook to control the resale prices of the principal complainant's products through contracts made by the selling agent with all purchasers of the products, by which such purchasers agreed to maintain the resale prices established from time to time by the complainants. The respondent, having signed such a contract, resold at less than the established prices goods purchased under the contract. The complainants sued in a federal District Court for an injunction against further violations of the resale provisions of the contract. *Held,* that the price-fixing contract relied on was void and unenforcible. Holmes and Van Devanter, JJ., *dissenting. Boston Store of Chicago v. American Graphophone Company* (March 4, 1918) U. S. Sup. Ct. Oct. Term, No. 363.

The actual decision adds little to what had been settled by prior cases, but the opinion is interesting for its review and interpretation of the previous decisions, and for the very broad statement of the rules which it deduces from them. On the general subject see (1917) *27* YALE LAW JOURNAL, 288, and other references there given; also (1918) *27 ibid.* 397. Mr. Justice Holmes persists in the dissent which he has registered in all the resale cases. Mr. Justice Brandeis, on the other hand, filed a brief concurring opinion, stating that whether such contracts should be permitted was an economic question, which should be decided by consideration of industrial and commercial facts, rather than established legal principles; that his personal views on the question were not in accord with those of the majority; but that he considered the law as settled for the court by the series of previous decisions relied on by the majority. Besides pointing out that a remedy had already been sought through application to Congress (evidently referring to a pending bill for which he himself, before his appointment to the bench, was one of the sponsors) he further intimated that relief might possibly be given by the Federal Trade Commission.

PLEDGES—LOSS OF LIEN—SURRENDER OF BILL OF LADING BY PLEDGEE ON ACCEPTANCE OF DRAFT.—The petitioner discounted a time bill drawn by a consignor of goods upon the consignee, the bill of lading being attached to the bill of exchange. The bill was duly accepted by the consignee and the bill of lading was surrendered to him. The acceptor and the drawer of the bill both became insolvent, and the former returned to the latter the specific goods in question in part satisfaction of general claims due the latter. *Held,* that by surrendering the bill of lading to the consignee upon acceptance of the bill of exchange, the petitioner lost his lien upon the specific goods and had no equitable lien thereon in case they were returned to the consignor. *Helburn Thompson Co. v. All Americas Merc. Corp.* (1917, App. Div.) 167 N. Y. Supp. 711.

The result of this decision is that the consignor is now in possession of both the goods and the price. There is no injustice in this, however, for the equity of the petitioner is no stronger than that of any other creditor of the consignor. He surrendered his lien by delivery of the bill of lading, as was contemplated originally. Thereafter he has no more interest in these goods than in any other goods of the consignee which might have been applied on the latter's indebtedness to the consignor.

PRACTICE—DECLARATORY JUDGMENTS—POWER TO DECLARE RIGHTS WITHOUT GRANTING OTHER RELIEF.—The petitioner was the devisee under the will of her father of certain real estate, devised to her, "her heirs and assigns forever." The

testator by his will ordered and directed that the devisee should at her expense provide for the maintenance and support of her two brothers during their natural lives. The petitioner sought to have the court declare, under a statute of 1915 giving "any person claiming a right cognizable in a court of equity, under a deed, will, or other written instrument [the privilege of applying] for the determination of any question of construction thereof," that she was seized in fee simple of the land, free from any charge thereon arising out of the direction to support her brothers. She asked for no other relief. *Held,* that the petitioner was entitled to obtain a declaration of her rights under the will, even though not incidental to a request for equitable relief, as the statute was not meant to be merely declaratory of existing law, but to be remedial. *In re Ungaro's Will* (1917, N. J. Ch.) 102 Atl. 244.

This appears to be one of the few American cases in which a departure has been recognized from the orthodox view that the aid of a court for the purpose of construction or for the purpose of declaring rights cannot be invoked in the absence of any concomitant request for coercive relief. An article by Professor Borchard, of the Yale School of Law, on the subject of declaratory judgments from the point of view of comparative law will be published in an early number of the YALE LAW JOURNAL.

PUBLIC SERVICE COMPANIES—REQUIREMENT OF UNPROFITABLE SERVICE—DUE PROCESS OF LAW.—After a proper hearing, the New York Public Service Commission ordered the plaintiff in error, a gas company, to extend its mains so as to supply a thriving district located a mile and a half beyond its nearest mains but within the territory included in its franchise. The company claimed that the order was confiscatory, and in violation of the Fourteenth Amendment, since the extension, in itself, would not yield a fair return, though it was not claimed that the general business of the company would not continue profitable. *Held,* that no constitutional right of the plaintiff in error was violated by the order. *People ex. rel. New York & Queens Gas Co. v. McCall* (1917) 38 Sup. Ct. 122.

The soundness of the decision itself is hardly open to controversy. The language of the court, however, to the effect that public service companies may not "pick and choose," serving only the most profitable portions of the territory covered by their franchises, and leaving the rest without service, obscures the real issue, which is not between the company and the applicants for service, but between the different portions of the community. It would be more accurate to say that within reasonable limits, for the good of the whole community, one portion must often pay temporarily, and sometimes permanently, a part of the cost of serving the rest. Unless the company could thus shift the burden, the requirement of the unprofitable service would be clearly confiscatory. The application of the principle depends, of course, on questions of fact, of reasonableness, and of balance of public benefit,—typically the sort of questions which public service commissions are created to determine.